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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

W. H. VORREITER

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
A. F. PRESCOTT,
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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

W. H. VORREITER

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court of Larimer County, State of Colorado, (Appendix A, *infra*, pp. 8-16), are not officially reported. The opinion of the Supreme Court of Colorado (Appendix A, *infra*, pp. 22-31) is not yet officially reported.

JURISDICTION

The judgment of the Supreme Court of Colorado was entered February 18, 1957. (Appendix A, *infra*, pp. 31-32.) A petition for rehearing was denied on March 11, 1957. (Appendix A, *infra*, p. 32.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether one of the Government's tax liens, which arose prior to the execution of any of the contracts under which the mechanics' lien claimants performed work or furnished material, was entitled to priority on the principle of "first in time, first in right."

2. Whether liens of the United States for unpaid federal taxes, arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939, are superior to mechanics' liens created by state law, where the Government's liens arose and were recorded prior to the time the mechanics' liens were reduced to judgment.

STATUTES INVOLVED

Sections 3670, 3671 and 3672(a) of the Internal Revenue Code of 1939, and Sections 86-3-1, 86-3-6, 86-3-9, 86-3-10, 86-3-11, 86-3-13, 86-3-14 and 86-3-15 of Colorado Revised Statutes. The pertinent portions of these statutory provisions are set forth in Appendix B, *infra*, pp. 33-37.

STATEMENT

From the undisputed facts, it appears that Eldridge S. Price, a resident of Ballinger, Texas, owned improved property on the north fork of the Big Thompson River in Larimer County, Colorado. While such owner, the United States assessed income taxes against Price and his wife, totaling at the time of trial $310,794.36. On July 23, 1953, the Collector of Internal Revenue at Austin, Texas, received income tax assessment lists against the Prices in the amount of $94,901.93. Other income tax assessment lists were received by the same Collector on August 27, 1953, December 3 and 31, 1953. Notice was served and demand for payment made, but without avail. Notices of liens for

these taxes were filed in the office of the County Clerk and Recorder of Larimer County on December 16, 1953, and December 31, 1953. (Appendix A, *infra*, p. 23.)

Between August 6, 1953, and August 14, 1953, W. H. Vorreiter and six other workmen and materialmen entered into individual contracts under the terms of which they were to perform services for, or furnish materials to, Price in connection with contemplated improvements of his property in Colorado. Pursuant to their contracts, performance was commenced by these several workmen and materialmen on various dates starting with August 6, 1953, and ending on August 20, 1953. The completion date was some time in October, 1953. (Appendix A, *infra*, p. 23.)

Lien statements for labor performed and materials furnished were filed by the several claimants in the office of the County Clerk and Recorder of Larimer County between October 30, 1953, and December 5, 1953; in all, they amounted to $4,455.85. (Appendix A, *infra*, p. 23.)

On February 18, 1954, Vorreiter, for himself and as assignee of the duly assigned claims of the other lien claimants, instituted suit in the District Court of Larimer County, Colorado, to foreclose his several lien claims. Because of its outstanding tax liens, the United States was made a party defendant. In the trial, no question was raised as to the validity of the mechanics' liens or the Government tax liens; the only issue presented was that of priority of the liens. (Appendix A, *infra*, p. 24.)

The trial court found that W. H. Vorreiter and the United States held valid first and second liens, respec-

tively, against the property in question in the respective amounts of $4,455.85 and $310,794.36, and ordered judgment *in rem* entered for them in those amounts. The court further ordered that, in the event the judgments were not paid within ten days from the date of its decree, the property be sold and the proceeds paid over to the claimants in the order of their priority. (Appendix A, *infra*, pp. 12-13.) Pursuant to that order, and on January 23, 1956, the property was sold at public auction for the sum of $4,600 and the money paid into the registry of court. Expenses of the sale, paid by Vorreiter, amounted to $55.05. (Appendix A, *infra*, pp. 18-21.) From the judgment entered, the United States perfected a writ of error to the Supreme Court of Colorado. (Appendix A, *infra*, p. 22.)

In affirming the judgment of the trial court, the Supreme Court of Colorado stated that there were "three cogent reasons" why the lower court correctly adjudged this case: (1) The Government does not require a third party to pay the taxes of a taxpayer; (2) the Government is amenable to the universally recognized doctrine of unjust enrichment; and (3) the lien of the United States attaches to so much, and no more, of the property interest which the taxpayer had at the time the tax lien came into being. (Appendix A, *infra*, pp. 28-29.)

In a "specially concurring" opinion, the chief justice of that court concluded (Appendix A, *infra*, pp. 30-31) that the mechanics' lien holders came within the terms "mortgagee, pledgee, purchaser, or judgment creditor" contained in Section 3672(a) of the Internal Revenue Code of 1939.

The decision of the Supreme Court of Colorado as to the relative priority to be accorded federal tax liens and mechanics' liens here involved is squarely in conflict with recent decisions of this Court, as well as with decisions of various state courts. In view of this conflict, and the recurrent character and continuing importance of the questions presented,[1] we submit that review and reversal of the decision below are fully warranted in order to preserve uniformity in the federal scheme of taxation. See *United States* v. *Gilbert Associates*, 345 U. S. 361, 364.

1. The Colorado District Court entered judgment *in rem* in favor of the United States for over $310,000. That judgment was not disturbed on appeal. Of the federal tax liens involved, one in the amount of over $94,000 arose prior to the dates that any of the contracts out of which the adverse liens arose were entered into. Hence, the decision of the Supreme Court of Colorado is in direct conflict with *United States* v. *Colotta*, 350 U. S. 808, reversing *per curiam*, 79 So. 2d 474 (Miss.), and *United States* v. *City of New Britain*, 347 U. S. 81. Its decision is also in direct conflict with the decisions of state courts in *Republic Nat. Life Ins. Co.* v. *Hedstrom*, 346 Ill. App. 555; *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413; and *Bankers Title & Abstract Co.* v. *Ferber Co.*, 15 N.J. 433.

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[1] While the federal liens here involved arose under Sections 3670 and 3671 of the Internal Revenue Code of 1939 (Appendix B, *infra*, p. 33), the Internal Revenue Code of 1954 re-enacts these provisions without substantive change. See Sections 6321, 6322, and 6323 of the 1954 Code; H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406-A407; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576.

Since the property involved sold for only $4,600, federal tax liens which come within the "first in time, first in right" rule are more than sufficient to absorb the entire fund available for distribution. Hence, application of this rule warrants a summary reversal of the decision below.

2. In addition, as to the federal tax liens which arose subsequent to the contracts for labor and material but prior to the perfection of the adverse liens, the decision of the court below is in direct conflict with *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, reversing *per curiam*, 227 F. 2d 359 (C.A. 7th), rehearing denied, 351 U.S. 958.[2] The decision is also in direct conflict with *United States* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613; *Fleming* v. *Brownfield*, 47 Wash. 2d 857; and *Gregory Shott, Adm.* v. *The Peoples Bank* (Ohio C.A.), decided January 28, 1957.

Clearly the mechanics' lienors here do not fall within any one of the classes enumerated in Code Section 3672 (a) (Appendix B, *infra*, p. 33)—mortgagee, pledgee, purchaser or judgment creditor. These terms are used in their conventional sense. *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47, 52; *United States* v. *Scovil*, 348 U. S. 218, 220-221; *United States* v. *Gilbert Associates*, 345 U. S. 361, 364. Furthermore, notices for all the federal tax liens, totaling over $310,000, were filed in Larimer County, Colorado, where the real estate involved is situated, prior to the

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[2] While neither this case nor *United States* v. *Colotta*, 350 U. S. 808, was cited in either the major or concurring opinion below, it is clear from both that the court below was well aware that its decision was contrary to both decisions.

date any one of the adverse lienors secured judgment for his lien.

CONCLUSION

The questions presented have already been authoritatively settled by this Court. Under those decisions, the decision below is clearly erroneous. The Court may consider it appropriate, therefore, to grant certiorari and reverse the judgment without further briefs or argument. Cf. *United States* v. *Colotta*, *supra*; *United States* v. *White Bear Brewing Co.*, *supra*.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
A. F. PRESCOTT,
GEORGE F. LYNCH,
Attorneys.

JUNE 1957.

Filed in District Court Larimer County, Colo. at —M. Dec. 8, 1955, KENNETH A. JOHNSON, *Clerk*

IN THE DISTRICT COURT OF LARIMER COUNTY AND STATE OF COLORADO

CIVIL ACTION NO. 11531

W. H. VORREITER, PLAINTIFF,

vs.

ELDRIDGE S. PRICE, UNITED STATES OF AMERICA, R. W. HAYNIE, TRUSTEE IN BANKRUPTCY IN THE BANKRUPT ESTATE OF ELDRIDGE S. PRICE, DEFENDANT.

FINDINGS AND DECREE

Now on this 18th day of November, 1955 this cause comes on for hearing by the Court upon the trial of the issues presented by the pleadings herein; the plaintiff appeared in person and by Conrad L. Ball, one of his attorneys; the defendant United States of America appearing by Robert D. Inman, Assistant United States Attorney for the District of Colorado and all of the other defendants appearing not, neither in person nor by attorney but being wholly in default.

The Court considers and finds that all the parties named as defendants herein have each and all been duly and regularly notified of the commencement and pendency of said action by personal service of summons, all of which service is hereby approved and confirmed by the Court.

The Court considers and finds that the defendant United States of America has appeared herein and

filed its answer; that each and all of the other defendants have failed and neglected to appear, plead or answer; that the time within which to file pleadings has long since expired and therefore the default of all of the defendants who have not appeared is entered of record; that the issues have been joined upon the pleadings filed and that said cause is now at issue and the trial thereof should be proceeded with at this time; thereupon the trial of said cause is proceeded with and the Court having heard the evidence of the plaintiff and evidence of defendant United States of America and the argument of Counsel continues the cause from this date to December, 1955 for settling the findings, entering the judgment and signing the decree.

The matter coming on for hearing before the Court on December 5, 1955 in accordance with the continuance as ordered, the attorneys for the plaintiff filed in Court an affidavit setting forth that the defendant Eldridge S. Price was not in the Military Service of the United States or its Allies and had not been in such service within thirty days prior to the date of the original hearing or thirty days prior to the entering of this decree, and the Court having at all times required strict proof herein as to all claims asserted by any of the parties, doth find:

1. That the plaintiff W. H. Vorreiter is the owner and holder of certain mechanic liens and the indebtedness evidenced and secured thereby as sued upon in his complaint which said mechanic liens are held by him for himself and as assignee of other lien claimants with notices of liens having been filed on the dates shown in the book and page mentioned in the office of the County Clerk and Recorder of Larimer County, Colorado and with the amounts found to be due as of the date of the hearing as follows:

Claimant	Date filed	Book and Page		Amount due
W. H. Vorreiter	Oct. 30, 1953	959	520	$356.50
W. B. Hite	Oct. 30, 1953	959	518	1058.58
Harold G. Ziessow	Oct. 30, 1953	959	519	970.95
Ed S. Chermak	Oct. 30, 1953	959	521	102.31
B. L. Graves	Dec. 5, 1953	962	590	284.22
Leona Graves	Dec. 5, 1953	962	589	469.59
Merl C. Longwill	Nov. 7, 1953	961	236	1213.70

That all of said mechanic lien claims have been duly and regularly assigned to the plaintiff, W. H. Vorreiter, and he is the owner and holder of said lien claims and the indebtedness secured thereby; that there is now due and owing to the plaintiff W. H. Vorreiter the sum of $4,455.85 with interest accrued to this date for and on account of the indebtedness secured by said liens and the further sum of $14.00 for costs expended; that said plaintiff W. H. Vorreiter is entitled to recover judgment in rem herein against the property involved for all such amounts and is entitled to have the mechanic lien foreclosed as a first and prior lien upon the above described property.

2. That the defendant United States of America is the owner and holder of tax claims against the defendant Eldridge S. Price which claims as of the date of the hearing are in the total amount of $310,794.36 all of which amount constitutes a lien in favor of the United States of America against the property herein involved which lien is a valid second lien upon said property subject only to the first and prior lien of the plaintiff and that the defendant The United States of America is entitled to have its tax lien foreclosed; that the defendant United States of America is further entitled in accordance with the provisions of Title 28 U.S.C.A. Section 2410 (*c*) in the event that its total claim is not paid in full to have one year from the date of the sale of said property within which to redeem the same.

3. That the right, title, interest, estate, equity or lien of each and all of the defendants herein in and to the real estate hereinafter described or any part or

portion thereof is subsequent, junior, inferior and subordinate to the equity and lien of the plaintiff as hereinabove set forth and determined; that the right, title, interest, estate, equity, or lien of the defendant Eldridge S. Price and R. W. Haynie, Trustee in Bankruptcy in the Bankrupt Estate of Eldridge S. Price, in and to the real estate hereinafter described or any part or portion thereof is subsequent, junior, inferior and subordinate to the lien of the defendant United States of America as hereinabove found and determined; and that in the event said real estate is sold as hereinafter provided and is not redeemed from such sale within the time and in the manner provided by the laws of the State of Colorado, that the defendants, Eldridge S. Price and R. W. Haynie, Trustee in Bankruptcy in the Bankrupt Estate of Eldridge S. Price and each of them, should be forever barred, foreclosed and precluded from ever having, asserting, or claiming to have any right, title, interest, estate, equity or lien therein or thereto, from and after the expiration of said period of redemption; and furthermore, that in the event said premises are sold as hereinafter provided and are not redeemed from such sale within the time of one year from the date of such sale as herein fixed and provided for the benefit of the defendant, United States of America, that said defendant United States of America should be forever barred, foreclosed and precluded from ever having, asserting or claiming to have any right, title, interest, estate, equity or lien therein or thereto from and after the expiration of said one year period of redemption.

NOW, THEREFORE, IT IS BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff W. H. Vorreiter have and recover a judgment in rem herein for the sum of $4,455.85

which includes interest to this date and for costs expended in the sum of $14.00; and for the costs to accrue; that said judgment in rem shall be against the property involved in this action and against all of the defendants named herein for the foreclosure of his mechanic lien as a first and prior lien upon the property hereinafter described as security for the indebtedness for which judgment is herein rendered.

2. That the defendant United States of America have and recover a judgment in rem herein for the sum of $310,794.36 which includes interest to this date and for costs expended in the sum of $ None; that said judgment in rem shall be against each and all of the other defendants named in this action for the foreclosure of said defendant United States of America's tax lien upon the property hereinafter described as a second lien upon said property, subject only to the first lien of the plaintiff, as security for the indebtedness for which judgment is herein rendered in favor of said United States of America.

3. That the defendant United States of America in the event its judgment is not paid in full from the sale of said property shall, in accordance with Title 28 U.S.C.A. Section 2410 (c) have one year from the date of the sale of said property within which to redeem the same from the sale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the judgments herein rendered are not paid within ten (10) days from the date hereof together with interest accrued thereon and the costs herein awarded, a certified copy of this Decree shall be delivered by the Clerk of this Court to the Sheriff of this County as his warrant and authority for making sale of the premises involved in this action, which premises are known and described as:

All that portion of SE¼of NW¼ of Section 25, Township 6, Range 72 which lies North and West of County Road along North side of North Fork of Big Thompson River through said SE¼ of NW¼ except that portion as described in Book 738, page 134, Larimer County, Colorado, records.

whereupon said sheriff shall forthwith proceed to advertise, in the manner provided by law for the sale of lands under execution, and sell at public auction or vendue for cash all of the above and foregoing described real estate as an entire tract or parcel, but it shall not be necessary for levy to be made or certificate of levy filed; and said sheriff is hereby authorized and directed to make application of the proceeds arising from the sale thereof as follows:

First: That he retain all fees and expenses properly and necessarily incurred by him in connection with the holding of said sale.

Second: That he pay to the plaintiff all costs awarded the plaintiff in this action accrued or accruing and which have been advanced and paid by plaintiff.

Third: That he pay to the plaintiff the sum of $4,455.85 together with interest thereon at the rate of 6% per annum from and after the date hereof.

Fourth: That he pay to the defendant United States of America the sum of $310,794.36 together with interest thereon at the rate of 6% per annum and after the date hereof and the further sum of $ None costs awarded.

Fifth: That the balance or residue, if any there be, be deposited with the Clerk of this Court to await further order of the Court herein.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the period of redemption from the sale herein shall be as to all parties and persons interested, except the defendant United States of America, the usual and ordinary period of redemption provided for by the laws of the State of Colorado upon the sale of real estate under execution, but that insofar as the defendant United States of America is concerned, the period of redemption herein shall be for one year from the date of sheriff's sale.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that upon holding said sale the sheriff issue and deliver to the purchaser of said premises a good and sufficient certificate of purchase therefor providing among other things, that if redemption of said property be not made from said sale within the time and in the manner provided by law and as herein fixed in this decree, the then sheriff of said county will upon surrender of said certificate of purchase, issue and deliver to the purchaser, his or its heirs, successors or assigns a good and sufficient sheriff's deed to and for the property so sold, and that as soon as possible after the holding of said sale, said sheriff report to the Court in writing his acts and doings in the premises.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that in the event that the plaintiff herein shall be the successful bidder at the sheriff's sale, he shall be required to pay in cash only such amount as is necessary to pay the costs accrued and accruing in connection with the sale and in addition thereto such an amount as said plaintiff's bid may exceed the plaintiff's own judgment recovered herein with interest to the date of sale. A sale to the plaintiff herein upon such payment as above provided, shall be deemed and considered a sale for cash. That the plaintiff or the defendants or any of them, may bid and become a pur-

chaser at said sheriff's sale the same as any individual or corporation might do.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that from and after the expiration of the period of redemption from said sheriff's sale as allowed by the laws of the State of Colorado, the defendants Eldridge S. Price and R. W. Haynie, Trustee in Bankruptcy in the Bankrupt Estate of Eldridge S. Price, and each of them, and any and all persons claiming by, through or under them or any of them, shall be and they are hereby forever barred, foreclosed and precluded from having or claiming to have any right, title, estate, equity or lien in and to said described real estate or any part or portion thereof; and that from and after the expiration of the period of one year from the date of said sheriff's sale, the defendant United States of America and any and all persons claiming by, through, or under it shall be and they are hereby forever barred, foreclosed and precluded from having or claiming to have any right, title, estate, equity or lien in or to said described real estate or any part or portion thereof.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that in the event said premises are not redeemed from said sheriff's sale within the time and in the manner provided by law and as fixed herein, the then sheriff of said county shall upon expiration of said periods of redemption and upon surrender of the certificate of purchase, issue and deliver to the purchaser, his or its heir, successors, or assigns, a good and sufficient Sheriff's Deed to and for the premises so sold; and thereupon said purchaser, his or its heirs, successors, or assigns, shall be entitled to full and immediate possession of said premises, and each and every part thereof. Should such possession be refused by said defendants, or any of them, or anyone claim-

ing by, through, or under them, or any of them, by right or title acquired subsequent to the commencement of this action, or others bound by this decree, after due and proper demand being made for such possession, the clerk of this court shall upon the verified application of the purchaser, his or its heirs, successors, or assigns, and without notice, issue to the sheriff of the county or counties in which said lands are located a writ of assistance commanding him to forthwith eject and remove all such persons in possession from said premises, and to place and maintain in the quiet and peaceable possession thereof said purchaser, his or its heirs, successors, or assigns.

BY THE COURT:

DONALD A. CARPENTER,
Judge.

Approved as to Form:

ROBERT D. INMAN,
Assistant U. S. Attorney for
The District of Colorado.

IN THE DISTRICT COURT

No. 11531

STATE OF COLORADO,
County of Larimer, ss:

W. H. VORBEITER, PLAINTIFF,

vs.

ELDRIDGE S. PRICE, UNITED STATES OF AMERICA, R. W. HAYNIE, TRUSTEE IN BANKRUPTCY IN THE BANKRUPT ESTATE OF ELDRIDGE S. PRICE, DEFENDANTS.

JUDGMENT ENTRY

Thereupon, in accordance with direction for entry of Judgment contained in the Decree heretofore

signed, filed and entered of record on December 8, 1955, Judgment in rem for plaintiff and against defendant Eldridge S. Price, for $4,455.85 and costs of $14.00, and for costs to accrue, is accordingly entered of record. And further, Judgment in rem in favor of defendant, United States of America, and against all other defendants, for $310,794.36, is accordingly entered of record.

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF LARIMER AND STATE OF COLORADO

CIVIL ACTION No. 11531.

W. H. VORREITER, PLAINTIFFS,

vs.

ELDRIDGE S. PRICE, UNITED STATES, ET AL., DEFENDANTS.

REPORTER'S TRANSCRIPT

APPEARANCES:

CONRAD BALL, ESQ., OF SEAMAN & BALL, *Attorney for Plaintiffs, Loveland, Colorado.*

ROBT. INMAN, ESQ., *Assistant U S. Attorney, For Defendant.*

LODGED in the District Court of Larimer County, Colorado, Fort Collins, Colorado, this 27th day of March A. D. 1956.

KENNETH A. JOHNSON,
Clerk District Court,
Larimer County, Colorado.

By: GERTRUDE E. MECUM,
Deputy Clerk of the
District Court.

Filed in the Supreme Court of the State of Colorado, Apr. 25, 1956.

GEORGE A. TROUT,
Clerk.

MR. INMAN: I would also like to say at this time, and to point out to the court, that by stipulation with the attorneys for the plaintiff, notice of the taxes as set forth in the Commissioner's Assessment List, was served upon plaintiff and demand has been made therefor and refusal on the part of the plaintiff to pay same, and that no part of same has been paid; that demand was made in Austin, Texas within the proper time as set forth, and refusal of payment has been made by plaintiff.

IN THE DISTRICT COURT

No. 11531

STATE OF COLORADO,
County of Larimer, ss:

W. H. VORREITER, PLAINTIFF,

vs.

ELDRIDGE S. PRICE, UNITED STATES OF AMERICA, R. W. HAYNIE, TRUSTEE OF BANKRUPTCY IN THE BANKRUPT ESTATE OF ELDRIDGE S. PRICE, DEFENDANT

SHERIFF'S RETURN AND REPORT OF SALE

The undersigned, Ray M. Barger, Sheriff of the County of Larimer in the State of Colorado, having been directed by the judgment and decree of foreclosure heretofore entered in the above entitled action to exe-

cute said judgment and decree and to make sale of the real estate hereinafter described, a certified copy of which decree has been delivered to me as my warrant and authority for making such sale, hereby makes report and return to the Court as follows:

That in compliance with the provisions of said decree of the court, and the statutes with reference thereto, I proceeded to make sale of the real estate hereinafter and in said decree described by causing a notice, stating the time and place of sale and containing a description of the real estate, to be published in the Loveland Reporter, a weekly newspaper, printed and published in the City of Loveland, and State of Colorado, and of general circulation in said County, for the space of twenty (20) days (four consecutive weeks) prior to the date of sale, the first publication thereof having been made on the 29th day of December, 1955, which said newspaper had been continuously and uninterruptedly published in said County during a period of at least fifty-two (52) weeks immediately prior to the first publication of said notice and had, prior to such publication, been duly admitted to the mails in said County as second class matter; all as more fully appears from a copy of said printed notice and the proof of publication thereof, which are hereto attached.

That at the time and place stated in said notice, to-wit: on the 23rd day of January, 1956, at 10:00 o'clock A. M., at the East front door of the Courthouse in Fort Collins, in the County of Larimer, and State of Colorado, I offered for sale and sold as one entire tract or parcel all of the following described real estate located and situate in the County of Larimer, State of Colorado, to-wit:

All that portion of SE¼ of NW¼ of Section 25, Township 6 North, Range 72 West of the 6th P. M.,

which lies North and West of County Road along North side of North Fork of Big Thompson River through said SE¼ of NW¼ except that portion as described in Book 738, page 134, Larimer County Colorado records.

to C. Marion Brafford for the sum of Four Thousand Six Hundred Dollars ($4,600.00); said purchaser being the highest bidder therefor and said bid being the highest and best cash bid obtained.

That I am turning into Court herewith the full amount of said purchase bid, to-wit: the sum of Four Thousand Six Hundred Dollars ($4,600.00).

That the plaintiff, W. H. Worreiter, had advanced and paid in cash the following fees and expenses in connection with said sale, to-wit:

Recording certified copy of decree	$11.55
Loveland Reporter, publication costs	26.00
Sheriff's sale notice	2.00
Certificate of purchase	2.00
Report and return	1.50
Advertising fee	2.00
Commission	10.00
	$55.05

That attached hereto and made a part of this report is the proof of publication, certified copy of decree under which said property was sold and check for Four Thousand Six Hundred Dollars ($4,600.00), full amount of bid.

RAY M. BARGER,
Sheriff of Larimer County, Colorado.

C. H. DODSON,
Undersheriff, Larimer County, Colorado.

CLERK'S CERTIFICATE OF COPY

STATE OF COLORADO,
County of Larimer, ss:

I, KENNETH A. JOHNSON, Clerk of the District Court of Larimer County, the same being a Court of Record, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of SHERIFF'S RETURN AND REPORT OF SALE, excluding the proof of publication, certified copy of decree under which said property was sold and check for Four Thousand Six Hundred Dollars, full amount of bid, as appears on file in Case No. 11531, wherein W. H. Vorreiter was plaintiff and Eldridge S. Price, United States of America, R. W. Haynie, Trustee of Bankruptcy in the Bankrupt Estate of Eldridge S. Price were defendants.

I further certify that on January 12, 1956, a Motion to Impound Funds Received From Sale was filed in the above entitled cause by Donald E. Kelley, United States Attorney for the District of Colorado, and also was signed by Robert D. Inman, Assistant United States Attorney for the District of Colorado, and that the records in this Court do not show that any order was entered impounding said funds, but the amount of $4600.00 is in the Registry Fund of this Court, being the amount received from the Sheriff of Larimer County in accordance with Sheriff's Return and Report of Sale.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Fort Collins, Colorado this 9th day of May, A.D. 1957.

——— ———, *Clerk*

By ——— ———, *Deputy Clerk*

That thereafter and on, to-wit: the eighteenth day of February, A. D. 1957, the opinion of the court in said

cause was announced and filed, which opinion is in words and figures as follows:

Filed in the Supreme Court of the State of Colorado. Feb. 18, 1957.

GEORGE A. TROUT,
Clerk.

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 17917

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

W. H. VORREITER, DEFENDANT IN ERROR

Error to the District Court of Larimer County
Honorable Donald A. Carpenter, Judge

JUDGMENT AFFIRMED

EN BANC

MR. CHARLES K. RICE,
Assistant United States Attorney General,
MR. LEE A. JACKSON,
MR. HARRY BAUM,
MR. SANDER W. SHAPIRO,
Attorneys, Department of Justice,
MR. DONALD E. KELLEY,
United States Attorney,
Attorneys for Plaintiff in Error.
MR. HERMAN W. SEAMAN,
MR. CONRAD L. BALL,
Attorneys for Defendant in Error.

MR. JUSTICE FRANTZ delivered the opinion of the Court.

This case involves the relative priority between mechanics' liens and the liens of the United States for

unpaid income taxes. The trial court adjudged priority in favor of the mechanics' liens over the liens of the United States. We are asked to reverse this judgment on the ground that the United States has been denied priority.

From the undisputed facts it appears that Eldridge S. Price, a resident of Ballinger, Texas, owned improved property on the north fork of the Big Thompson River in Larimer County, Colorado. While such owner, the United States assessed income taxes against Price and his wife, totalling at the time of trial $310,794.36. On July 23, 1953, the Collector of Internal Revenue at Austin, Texas received income tax assessment lists against the Prices in the amount of $94,901.93.

Between August 6, 1953 and August 14, 1953 the plaintiff and six other workmen and material men entered into individual contracts under the terms of which they were to perform services for, or furnish materials to, Price in connection with contemplated improvements of his property in Colorado. Pursuant to their contracts, performance was commenced by these several workmen and material men on various dates starting with August 6, 1953 and ending on August 20, 1953. The completion date was sometime in October 1953.

Lien statements for labor performed and materials furnished were filed by the several claimants in the office of the County Clerk and Recorder of Larimer County between October 30, 1953 and December 5, 1953. In all, they amounted to $4,455.85.

Other income tax assessment lists were received by the same Collector on August 27, 1953, December 3 and 31, 1953. Notices of liens for these taxes were not recorded in the office of the County Clerk and Recorder of Larimer County until December 16, 1953 and December 31, 1953.

On February 18, 1954 Vorreiter, for himself and as assignee of the duly assigned claims of the other lien claimants, brought this action to foreclose his several lien claims. In the trial no question was raised as to the validity of mechanics' liens or the government tax liens; the only issue requiring resolution by the trial court was that of priority.

The assessment lists set forth the names of Eldridge S. and Edith Wynn Price, their residence as Box 387, Ballinger, Texas, classified the debt as unpaid income taxes, giving the dates thereof, and included some remarks not pertaining to the question here to be resolved, but contained no description of the property affected.

Of importance in a consideration of this case is the fact that Eldridge S. Price was adjudicated a bankrupt, and his Trustee in Bankruptcy was a party defendant in this action.

The government contends that its liens are prior and superior for two reasons:

1. "Vorreiter's liens, being inchoate, imperfected liens, are inferior to the tax liens of the United States which arose and were recorded before Vorreiter's liens were reduced to judgment."

2. "The tax lien of the United States which arose under Section 3671 on July 23, 1953, is first in time and therefore superior to Vorreiter's liens arising under contracts the earliest of which was executed August 6, 1953, or for work performed, commencing at the earliest on August 6, 1953."

Necessary to a determination of the questions raised by the government are certain sections of the Internal Revenue Code of 1939 as amended and a portion of the mechanics' lien statute of this state. The following provisions of the Internal Revenue Code are pertinent to our inquiry:

"SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

"SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, *the lien shall arise at the time the assessment list was received by the collector* and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." (Emphasis supplied.)

"SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of Lien Without Notice.—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) Under State or Territorial Laws.—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated. * * *"

C.R.S. 1953, 86-3-6, in part provides:

"All liens, established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor, or * * * as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any and

every lien or encumbrance subsequently intervening, *or which may have been created prior thereto, but which was not then recorded, and of which, the lienor, under this article did not have actual notice.* Nothing herein contained, however, shall be construed as impairing any valid encumbrance upon any such land, duly made and recorded prior to the signing of such contract, or the commencement of work upon such improvements or structure. * * *" (Emphasis supplied.)

It is the contention of the United States that the mechanics' liens in this case were inchoate and that we must therefore invert the order of *priority* decreed by the lower court. According to the federal decisions relied upon involving questions of priority as between liens of various kinds and federal tax liens, it is necessary that the first-mentioned liens be certain and perfected before the federal lien attaches ere they can be said to be superior to the federal liens.

The contention of the federal government, if applied to liens in Colorado, would upset long established rules of property in this state. "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the federal courts." Bucher v. Cheshire Rd. Co., 125 U.S. 555, 8 S. Ct. 974, 31 L.Ed. 795.

A hypothetical situation, set forth in Vorreiter's brief, shows how the above quoted portions of the Internal Revenue Code, and the law construing them, overturn settled rules of property of this state. Richard Roe of Miami, Florida owns a summer residence at

Evergreen, Colorado. He has not paid his federal income taxes. The Collector of Internal Revenue at Miami receives an assessment list on June 1, 1955. During July, Roe undertakes extensive improvements on his summer residence amounting to $7500.00. These improvements are completed on October 1st and on November 15th lien statements are filed in the office of the Clerk and Recorder. In August, Roe obtains a $500.00 loan from his friend, John Doe, and gives John Doe a deed of trust on the summer residence, which deed of trust is properly recorded. On October 15th a judgment creditor of Roe's levies an execution on the summer residence. On December 10th the government files its notice of tax lien in the sum of $7500.00 in the office of the Clerk and Recorder. There are, therefore, the following claims of liens listed in the order in which they arose:

1. Claim of the United States for income taxes;
2. Claim of mechanics' lienholders;
3. Lien of the deed of trust;
4. Lien of the judgment creditor.

How is the priority of these liens to be fixed in the event the government's lien is prior to the mechanics' liens? The mortgagee and the judgment creditor are within the exception mentioned under Section 3672, supra, and, therefore, have priority over the government's lien; yet, under state law, the mechanics' liens are prior to the liens of the mortgagee and the judgment creditor because the work was commenced before either the mortgage lien or the judgment lien attached. According to the government's contention, the claims of the mechanics, not being expressly mentioned in Section 3672, supra, are inferior to the tax lien. But, by virtue of the same section, the government cannot have priority against the mortgagee and judgment creditor.

May the structure of property law of the state be thus pulled down? The Supreme Court of the United States "has not hesitated when there has been a conflict of decision between it and the state courts, affecting a rule of property within the state, to overrule its own decisions and to follow the state decisions once it has become evident that they have established a 'rule of property' as the settled law of the state. . . ." Edward Hines Yellow Pine Trustees v. Martin, 268 U.S. 458, 45 S. Ct. 543, 69 L. Ed. 1050. See Warburton v. White, 176 U.S. 484, 20 S. Ct. 404, 44 L. Ed. 555.

Even though doubt is cast upon the strength of the position taken by the Attorney General of the United States regarding priority of tax liens over statutory liens by what we have said, with due respect to the arguments advanced to sustain him we believe there are three cogent reasons why the lower court correctly adjudged this case. First, the government does not require a third party to pay the taxes of a taxpayer. And it should make no difference that the payment is in the form of property—the form of property in this case being the enhancement of the value of Price's property by labor performed and materials supplied in the improvement thereof. United States v. Bank of Shelby, 68 F. (2d) 538; United States v. Bank of United States, 5 F.S. 942; Jacobson v. Hahn, 14 F.S. 339.

The Jacobson case involved Liberty bonds deposited in lieu of bail by the plaintiff with the Clerk of the Federal District Court in a criminal action. Notice of lien and levy for failure to pay income taxes was filed with said clerk. Upon acquittal plaintiff sued the clerk and the Collector of Internal Revenue to recover the bonds. It was proved that part of the money used to purchase the bonds belonged to the plaintiff and part to the defendant in the criminal action. The court held that the Collector had a lien on that portion of the

bonds for which defendant supplied the money, and that plaintiff could recover the balance of the bonds.

Second, the government is amenable to the universally recognized doctrine of unjust enrichment. This equitable doctrine is bottomed on the principle of fairness and justice. It has had application in tax cases involving questions of priority. United States v. Albert Holman Lumber Co., 206 F. (2d) 685; In re Taylorcraft Aviation Corp. 168 F. (2d) 808. "The essential principle upon which the mechanic's lien rests is that of unjust enrichment. It is uncontradicted in this record that the giving of a priority to the United States over the mechanic's lien also gives the United States the enhancement of the value of the property which resulted from the work performed and the material supplied by the appellee." Per Justice Allen, In re Taylorcraft Aviation Corp., supra.

Third, the lien attaches to so much, and no more, of the property interest which the taxpayer had at the time the tax lien came into being. United States v. Kaufman, 267 U.S. 408, 45 S. Ct. 322, 69 L. Ed. 685; United States v. Pacific R. Co. (1880; C.C.) 1 McCrary, 1, 1 Fed. 97; Jones v. Kemp, 144 F. (2d) 478; United States v. Winnett, 165 F. (2d) 149; Louisiana State University v. Hart, 210 La. 78, 26 So. (2d) 361, 174 A.L.R. 1366.

Any of these three theories is applicable to the instant case. It must be remembered that when the federal lien attached, the improvements giving rise to the plaintiff's liens were not in existence. To permit the federal government to have the benefit of the value of these improvements would be to present it with a windfall. If the government were to succeed, it would in effect be collecting the taxes owing by Price, by appropriating the labor and materials of the lien claimants integrated into his property in Colorado; would be un-

justly enriched at the expense of third parties, these lien claimants, and would be receiving more than the property to which the lien attached. We believe and so hold that upon the record before us the government's position cannot be sustained.

The judgment is therefore affirmed.

Mr. Chief Justice Moore specially concurring.

Mr. Justice Holland not participating.

Mr. Chief Justice Moore specially concurring:

It is most interesting to observe that the cases chiefly relied on by counsel for the United States are two decisions of the Supreme Court of the United States wherein it appears that the lower courts were in accord with the views expressed by the opinion of this court in the instant case; however the United States Supreme Court reversed the lower court without written opinion.

I am at a loss to understand how justice could possibly be served by appropriating the labor and materials of workmen to the payment of the tax delinquency of another under the circumstances disclosed by the record in the case at bar. About the only rule we can think of that could support such a result is the one referred to by Mr. Justice Burke in People v. Kilpatrick, 79 Colo. 303, 245 Pac. 719, as follows:

> "The good old rule, the simple plan,
> That they should take who have the power
> And they should keep who can."

The opinion in that case also contained the following language which we think is applicable here:

> "The construction given the act in question by the trial court [Supreme Court of the United States] is fraught with such momentous and disastrous results that we would need go no further than invoke against it the fundamental rule that

absurd interpretations will not be given statutes when reasonable ones may be resorted to. A reasonable one here lies at hand."

The federal statute provides that the lien claimed by the government "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed * * *" as provided by state law. Justice clearly requires an interpretation that the mechanics' lien holders in this case, who had no notice actual or constructive, are included within these exemptions. If this cannot be done the statute does violence to the constitution in that it deprives the workmen of the fruits of their labor without due process of law.

Whereupon, and on the aforesaid eighteenth day of February, A. D. 1957, the following proceedings were had and done, to-wit:

17917

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

W. H. VORREITER, DEFENDANT IN ERROR

ERROR TO THE DISTICT COURT OF LARIMER COUNTY

This cause having been brought to this Court by writ of error to review the judgment of the District Court of Larimer County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that said defendant in error do have and recover of and from said plaintiff in error his costs in this Court expended, to be taxed.

That thereafter and on, to-wit: the eleventh day of March, A. D. 1957, the following proceedings were had and done, to-wit:

17917

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

W. H. VORREITER, DEFENDANT IN ERROR

ERROR TO THE DISTRICT COURT OF LARIMER COUNTY

The Court having considered the motion of the plaintiff in error for a rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Colorado Revised Statutes (1953), c. 86, Article 3:

86-3-1. *Liens in favor of whom—filed, when.*—Mechanics, material men, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, * * * shall have a lien upon the property upon which they have rendered service or bestowed labor or for which they have furnished materials * * * for the value of such services rendered or labor done or material furnished * * *.

* * * * *

86-3-6. *Priority of lien—attachments.*—All liens established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor, or * * * as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any and every lien or encumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which, the lienor, under this article did not have actual notice. Nothing herein contained, however, shall be construed as impairing any valid encumbrance upon any such land, duly made and recorded prior to the signing of such contract, or the commencement of work upon such improvements or structure. * * *

86-3-9. *Lien statement.*—Any person wishing to avail himself of the provisions of this article shall file for record, in the office of the county recorder

of the county wherein the property * * * to be affected by the lien is situated, a statement containing:

(1) The name or names of the owner * * *.

(2) The name of the person claiming the lien, the name of the person who furnished the material or performed the labor for which the lien is claimed, and the name of the contractor * * *.

(3) A description of the property to be charged with the lien * * *.

(4) A statement of the total amount of the indebtedness, the amount of the credits thereon, if any, and the balance * * *.

Such statement shall be signed and sworn to by the party * * * claiming such lien * * *. * * * there must be served upon the owner * * * of the property * * * the statement above provided for * * *. All such lien statements claimed for labor and work by the day or piece * * * must be filed for record after the last labor for which the lien claimed has been performed and at any time before the expiration of one month next after the completion of the building * * *. All lien statements of all other subcontractors and of all material men * * * must be filed for record after the last labor is performed or the last material furnished * * * and at any time before the expiration of two months next after the completion of such building * * *. The lien statements of all other principal contractors must be filed for record after the completion of their respective contracts and at any time within three months next after the completion of the building * * *.

* * * * *

86-3-10. *Action commenced within six months.*—No lien claimed by virtue of this article, * * * shall hold the property longer than six months after the last work or labor is performed, or materials furnished or after the completion of the building * * * or * * * alteration * * *, as prescribed in section 86-3-9, unless an action shall have been commenced within that time to enforce the same, and unless also a notice stating that such action has been commenced shall have been filed for record within that time in the office of the clerk and recorder of the county in which said property is situate. * * *

86-3-11. *Joinder of parties—consolidation of actions.*—Any number of persons claiming liens against the same property and not contesting the claims of each other, may join as plaintiffs in the same action; * * *.

* * * * *

* * * Any party claiming a lien, not made a party to such action, at any time within the period provided in section 86-3-9, may be allowed to intervene by motion, upon cause shown, and may be made a party defendant on the order of the court or the judge thereof, who shall fix, by such order, the time for such intervenor to plead or otherwise proceed. The pleadings and other proceedings of such intervenor thus made a party shall be the same as though he had been an original party. Any defendant who claims a lien, in answering, shall set forth by cross complaint his claim and lien. Likewise such defendant may set forth in said answer defensive matter to any claim or lien of any plaintiff or codefendant, or otherwise deny any such claim or lien. * * *.

86-3-13. *Hearing—judgment—summons.*— * * * Judgments shall be rendered according to the rights of the parties. * * * Each party who shall establish his claim under this article shall have judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien shall have attached to the extent hereinbefore stated.

* * * * *

86-3-14. *Disposition of proceeds—execution.*— The court shall cause said property to be sold in satisfaction of said liens and costs of suit as in case of foreclosure of mortgages; and any party in whose favor a judgment for a lien may have been rendered, may cause the property to be sold within the time and in the manner provided for sales of real estate on executions issued out of any court of record, and there shall be the same rights of redemption as are provided for in the case of sales of real estate on executions. * * *

* * * * *

86-3-15. *Parties to action.*—Principal contractors and all other persons personally liable for the debt for which the lien is claimed shall be made parties to actions to enforce liens under this article * * *.

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